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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

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)
Advanced Television Systems)
and Their Impact upon the)
Existing Television Broadcast)
Service)

MM Docket No. 87-268

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COMMENTS OF THE WB TELEVISION NETWORK

Diane S. Hinson
Susan H. Crandall
Joyce H. Jones
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006-1888
Telephone: (202) 887-1500

Counsel for The WB Television Network

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SUMMARY

As a nascent television network, The WB has struggled and continues to struggle to create a network of local affiliates to distribute its programming on a nationwide basis. If the Commission adopts its proposed plan for digital television ("DTV"), it will compound the challenges of creating a new network, both in an NTSC and DTV environment. The WB files these comments in an effort to ensure that the Commission does not, in its movement toward a DTV world, thwart the development of new networks like The WB, however unwittingly, by preventing the creation of new affiliates, *i.e.*, new stations, under both a DTV and NTSC standard. These new networks will increase broadcast diversity -- a long-standing goal of the Commission. The WB intends, for example, to provide viewers with family-oriented programming.

To this end, The WB opposes the Commission's proposal to reclaim immediately a predetermined number of channels allocated to television. Instead, The WB urges the Commission to utilize, at least during the transition to DTV, all of the spectrum currently allocated to television. Only after the transition is complete, to the extent spectrum remains available, should the Commission reclaim and reallocate any spectrum that is not needed to accommodate all existing broadcasters, including applicants who filed before the Commission's September 20, 1996 cut-off. To do otherwise would disserve the public interest by frustrating the creation of new stations available for affiliation with new networks in both the NTSC and DTV environments. In addition, the Commission's proposal to reduce immediately the spectrum available to television will further disserve the public interest by preventing some communities from receiving their first commercial television station.

The WB also urges the FCC to reconsider its proposal to delete the nearly 600 NTSC allotments that are currently vacant. Applications that are currently pending for these allotments represent the opportunity for greater television diversity, which should not -- and need not -- be sacrificed in the process of transitioning to DTV. Regardless of the DTV plan ultimately adopted, the Commission should commit to rule on all pending NTSC station applications and rulemakings for new NTSC stations *before* assigning any DTV channels.

Finally, The WB urges the Commission to adopt a DTV plan that fosters the growth of nascent networks by affording new stations -- the potential affiliates of new networks -- flexibility in a variety of ways. First, the Commission should allow entities with pending applications and rulemakings for NTSC stations to modify their applications to conform with the final DTV plan. Second, the Commission should adopt its proposal to permit broadcasters to negotiate and enter into co-location agreements. Such agreements will allow additional channels to be allotted in a market, which in turn will increase affiliation opportunities for new networks. Third, the Commission should eliminate those UHF taboos that have been proven to be unnecessary to prevent interference. Such taboos restrict unnecessarily the number of channels that can be allotted in a market and thereby limit affiliation opportunities for new networks. Finally, the Commission should assign DTV channels to currently non-“eligible” broadcasters if spectrum is or later becomes available. If sufficient spectrum is unavailable, the Commission should allow those broadcasters to convert their NTSC channel to DTV.

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COMMENTS OF THE WB TELEVISION NETWORK

The WB Television Network ("The WB") submits these Comments in response to the Sixth Further Notice of Proposed Rulemaking released by the Commission on August 14, 1996 in the above-captioned proceeding.¹

INTRODUCTION

As The WB approaches the close of its second year as a new television network, it continues to face many of the same hurdles that it faced in January 1995 when this new network was launched. The most critical challenge facing The WB has been and remains finding enough television stations with which the network can affiliate to create a national distribution system and gain the requisite audience reach required by national advertisers.² The

¹ 11 FCC Rcd 10968 (1996) ("Sixth Further Notice").

² The WB's national advertisers require coverage of *at least 80 percent* of the country. UPN's national advertisers require the same level of coverage. See Comments of the United Paramount Network, *Review of the Commission's Regulations Governing Program Practices of Broadcast Television Networks and Affiliates* 47 C.F.R. §§ 73.658(a), (b), (d), (e) and (g),

WB discussed its critical need for affiliates in its comments and reply comments in an earlier Commission proceeding regarding the agency's rules governing networks and their affiliates, explaining that "[f]inding stations with which it can affiliate has been the most frustrating task for The WB because it has so little ability to affect the outcome."³ If the Commission proceeds as proposed in the Sixth Further Notice, the affiliation challenges faced by The WB and other nascent networks will be even more daunting once the conversion to digital television ("DTV") begins.

The FCC has duly recognized the benefits that competition brings to the video marketplace and has consistently demonstrated its commitment to removing barriers that impede the development of new networks.⁴ As the television industry transitions to DTV, new

MM Dkt. 95-92, at 14 & n.18 (Oct. 30, 1995) ("UPN Network/Affiliate Comments"). This requirement is standard in the TV market. Currently, The WB's over-the-air broadcast affiliates cover only 65 percent of the country. Cynthia Littleton, *WB, UPN rally the troops*, *Broadcasting & Cable*, June 10, 1996, at 20. Although The WB's over-the-air coverage is supplemented by carriage on superstation WGN(TV), which has cable coverage of approximately 19 percent, this cable coverage is far from equivalent to over-the-air broadcast coverage. Quite simply, this is because one third of all households (approximately 35 million households) do not subscribe to cable, and instead rely on over-the-air television as their sole access to the video marketplace.

³ Comments of the Warner Bros. Television Network, *Review of the Commission's Regulations Governing Program Practices of Broadcast Television Networks and Affiliates* 47 C.F.R. §§ 73.658(a), (b), (d), (e) and (g), MM Dkt. 95-92, at 5 (Oct. 30, 1995) ("The WB Network/Affiliate Comments").

⁴ See Federal Communications Commission, *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060 (May 1941) at 88 ("An open door to new networks will stimulate the old and encourage the new."); *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d 318, 333 (1970) ("Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of this Commission."); *Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. § 73.658*, 5 FCC Rcd 3211, 3211 & n. 9 (1990) (citing Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. 1 Oct. 1980)), *modified*, 6 FCC Rcd 2622

networks will continue to struggle to find a sufficient number of affiliates to constitute a viable national network.⁵ While DTV has the potential for creating new affiliation opportunities, the Commission's proposed conversion plan would have the opposite effect. At present, the Commission proposes to assign a DTV license only to each "eligible" NTSC broadcaster.⁶ This assignment plan will do nothing to increase the number of DTV stations available for affiliation with new networks in a digital environment. To the contrary, the Commission's plan as currently proposed will result in even *fewer* stations being available as potential affiliates under a DTV standard because not all existing broadcasters qualify as "eligible" for a DTV channel. Indeed, it is the broadcasters with pending applications -- precisely those most likely to affiliate with a new network -- that are excluded from the proposed DTV allotment scheme.

(1991) (grant of waiver "will advance the Commission's oft-stated public interest objective of encouraging new national networks"); *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 47 C.F.R. 73.658(a), (b), (d), (e) and (g), 10 FCC Rcd 11951, 11955 (1995) ("Network/Affiliate Rulemaking") (a goal of network/affiliate rules is "[t]o remove barriers that would inhibit the development of new networks").

⁵ This struggle has been fierce in the NTSC environment because even if a fifth network could affiliate with every available, viable station in the country, the network would only have slightly more than 70 percent coverage nationwide. UPN Network/Affiliate Comments at 18. Because of the lack of full power TV stations available for affiliation, nascent networks such as The WB have been forced to rely on low power stations and secondary affiliations in order to gain entry into certain markets. In Baltimore, Maryland (the 23rd largest market), for example, The WB had to affiliate with a low power station to access the market. Likewise, in Cleveland, Ohio (the 13th largest market), which has eight commercial stations, and West Palm Beach, Florida (the 45th largest market), which has six commercial stations, The WB had to enter into secondary affiliations to enter the market. In addition, as explained above, in some markets The WB has relied, as a last resort, on WGN's carriage on cable as a distant signal.

⁶ The Commission currently proposes to define "eligible" broadcasters as "a) all full-service television broadcast station licensees; b) permittees authorized as of October 24, 1991; and c) all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service broadcast station licenses." Sixth Further Notice, 11 FCC Rcd at 10973-74.

In the near term, the Commission's proposed conversion to DTV will also hamper The WB's and other new networks' ability to create a viable distribution system by affiliating with a sufficient number of NTSC stations. As the Commission makes clear in its Sixth Further Notice, decisions regarding DTV will have a substantial impact on the availability of new NTSC television stations. The Commission acknowledges in the Sixth Further Notice that there are currently more than 300 applications for new television stations on file with the Commission that, if granted, would create more than 100 new NTSC stations.⁷ According to trade press reports, approximately 300 additional applications for new NTSC stations were filed with the Commission prior to the September 20, 1996 deadline established by the Sixth Further Notice.⁸ The Commission's desire to constrain DTV channels to the core spectrum at channels 7-51, and to reallocate immediately channels 60-69, must necessarily come at the price of limiting still further the available spectrum for new NTSC stations. Yet each of these new station applications represents an opportunity for a new network such as The WB to gain another necessary affiliate.⁹

The WB files these comments in an effort to ensure that the Commission does not, in its transition to DTV, foreclose the creation of new stations. Those new stations represent greater broadcast diversity not simply on a local basis (through the addition of another station)

⁷ Sixth Further Notice, 11 FCC Rcd at 10992.

⁸ Chris McConnell, *New TV applications flood FCC*, Broadcasting & Cable, September 30, 1996 at 9.

⁹ At least 41 of these new applicants have indicated a desire to affiliate with The WB, although there is no commitment on any party's part to enter into such affiliation agreements. See, e.g., Petition for Rulemaking, *Amendment of Section 73.606(b) of the Commission's Rules, TV Table of Allotments, to allot Channel 62 to Dallas, Pennsylvania*, MM Dkt. No. --, RM No. --, at attached Request for Waiver of ATV "Freeze" at 2 n.5 (July 23, 1996).

but also on a nationwide basis, because they are needed to form the critical backbone of the nascent television networks.

I. THE FCC SHOULD MODIFY ITS DTV PLAN TO AVOID IMPEDING THE GROWTH AND THREATENING THE VIABILITY OF NEW NETWORKS

In the Sixth Further Notice, the Commission proposes two options for DTV spectrum allocation. Under the FCC's preferred "DTV Core Spectrum Option," the Commission would attempt to provide all eligible broadcasters with a 6 MHz channel for DTV within the "core" spectrum, *i.e.*, channels 7 through 51.¹⁰ Under the "Alternative Spectrum Option" proposed by the Association of Maximum Service Television, Inc. ("MSTV"), DTV allotments would not be concentrated in the core spectrum.¹¹ Instead, each eligible broadcaster would be given a DTV channel without regard to a core spectrum.¹² The Commission appropriately queries "whether the different plans have different effects on the potential competitiveness of segments of the broadcasting industry *such as the emerging networks*."¹³

The answer to the Commission's query is straightforward and simple: any proposal that decreases the number of potential new affiliates for nascent networks in either the NTSC or DTV environments is harmful, indeed, potentially fatal, to those networks. Under the Commission's preferred proposal, by limiting the assignment of DTV channels to a predetermined portion of the spectrum (the "core" spectrum), the Commission reduces the number of channels (both NTSC and DTV) available for new television stations with which

¹⁰ Sixth Further Notice, 11 FCC Rcd at 10978.

¹¹ *Id.* at 10980-81.

¹² *Id.*

¹³ *Id.* at 10983.

nascent networks can (and must) affiliate. The WB urges the Commission to reconsider its proposal, because that proposal would frustrate the agency's long-standing public interest objective of fostering diversity by encouraging the growth of new national over-the-air television networks.

Rather than adopt the DTV Core Spectrum Option, The WB urges the Commission to delay making any decision about the precise amount of spectrum to be recovered until *after* the transition to DTV is complete and *after* the pending applications and rulemakings for new NTSC stations have been acted on. Only after both these events have occurred should the Commission determine how much spectrum it can recover for other uses.

The WB's proposal would allow for the greatest use of the spectrum while the transition to DTV is taking place -- a period during which spectrum will be most scarce and the period when the viability of the nascent networks will be most precarious. At the same time, the Commission's goal of recovering spectrum would be preserved. To be sure, the Commission's spectrum recovery plans would be delayed. That delay, however, will foster the development of new networks by removing their greatest barrier -- the availability of affiliates. Accordingly, the benefits of diversity clearly warrant the delayed recovery of spectrum. Delaying the recovery of spectrum will permit the Commission to achieve both goals -- encouraging new over-the-air networks and recovering spectrum for other uses -- rather than sacrificing one to the other. The WB thus urges the Commission to adopt the delayed spectrum recovery proposal described above.

II. THE FCC SHOULD MODIFY ITS DTV PLAN TO AVOID PREVENTING A NUMBER OF COMMUNITIES FROM RECEIVING THEIR FIRST COMMERCIAL TELEVISION STATION

In addition to the deleterious impact on new networks if the Commission were to adopt its plan as proposed, the Commission would also harm small communities by preventing many of them from receiving their first commercial television station. Section 307(b) of the Communications Act requires a fair, efficient and equitable distribution of television broadcast stations among the various states and communities.¹⁴ Indeed, one of the overarching priorities in the allotment of television channels is to provide at least one local television broadcast station to every community.¹⁵

Many of the pending applications for new television stations would, if granted, provide smaller communities with their first commercial broadcast television station. By limiting the amount of spectrum available for new NTSC stations during the transition to DTV, the FCC's proposal decreases the likelihood that these applications for first television stations in small communities will be granted. For this independent reason, the Commission should adopt a proposal that maximizes the available spectrum for NTSC stations, particularly during the transition to DTV. The proposal we have described above fits this bill.

¹⁴ 47 U.S.C. § 307(b). See *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (describing goal of Section 307(b) to "secure local means of expression").

¹⁵ *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Modesto and Ceres, California)*, 6 FCC Rcd 3613 (1991).

III. REGARDLESS OF THE PLAN ADOPTED, THE FCC SHOULD RULE ON ALL PENDING APPLICATIONS AND RULEMAKINGS FOR NEW NTSC STATIONS BEFORE ASSIGNING DTV CHANNELS

In the Sixth Further Notice, the Commission proposes to eliminate approximately 600 NTSC allotments that are currently vacant to increase the spectrum available for DTV.¹⁶ At the same time, however, the Commission states that it intends to consider the existing 300 applications for construction permits for new NTSC stations currently on file, as well as all applications for new NTSC stations filed on or before September 20, 1996 and all petitions for rulemaking to amend the Table of Allotments filed on or before July 25, 1996.¹⁷ The Commission has further stated that it will evaluate those applications for their effect on the DTV proposal and it has expressly reserved the right to determine that the public interest is served by *not* granting such new stations, by granting stations with limited facilities, or by granting stations subject to limitation on interference.¹⁸

While The WB agrees with the Commission's long-term goal of moving toward a DTV world, it urges the Commission not to sacrifice greater diversity of over-the-air television in the process. If the Commission is to remain faithful to its "long-standing policy of fostering programming and ownership diversity,"¹⁹ it should consider the role that new networks play in achieving that policy. Specifically, because new networks have an acute need for additional affiliates *now*, The WB urges the Commission to consider and act on all pending applications

¹⁶ Sixth Further Notice, 11 FCC Rcd at 10991.

¹⁷ *Id.* at 10992.

¹⁸ *Id.*

¹⁹ *Id.* at 10993.

and rulemakings for new NTSC television stations *before* it assigns DTV stations to eligible broadcasters.

It is also important that the Commission, in considering these pending applications and rulemakings, not evaluate interference under “the assumption that stations on the allotments involved would be operating at the maximum allowed power and antenna height.”²⁰

Appropriately, the DTV allotments proposed by the Commission in the Sixth Further Notice do not rely on this assumption. Instead, the Commission proposes to accommodate as many DTV channels as possible by limiting certain engineering criteria with respect to numerous DTV channels assigned to eligible broadcasters. Consistent with this approach, the Commission should allow applicants for new NTSC stations to select power, antenna pattern and height within a range of a typical minimum to the allowable maximum in order to “fit in” an NTSC channel where possible.

IV. THE FCC SHOULD ADOPT A DTV PLAN THAT PERMITS MAXIMUM FLEXIBILITY TO ACCOMMODATE NASCENT NETWORKS

Any channel assignment plan adopted by the Commission should permit the maximum amount of flexibility possible to accommodate emerging networks. The Commission can achieve this beneficial flexibility in a number of ways.

A. Applicants Should Be Allowed To Modify Their Pending Applications To Conform With The Final DTV Plan Adopted By The Commission

At this time it is far from certain what form the Commission’s DTV allotment plan ultimately will take. Regardless of the plan selected, however, The WB urges the Commission,

²⁰ *Id.* at 10989.

once a final DTV table of allotments is adopted, to afford pending NTSC station applicants whose proposed stations conflict with the table the flexibility to modify their applications to conform with the table. The applications that are on file for construction permits for new NTSC stations were based, necessarily, on the existing TV Table of Allotments and the vacant channels and new channel opportunities presented by that allotment plan. Once a final DTV plan is adopted, the Commission should afford applicants the flexibility to modify pending applications.

More specifically, if a pending application for a particular NTSC channel can no longer be granted as filed because it conflicts with the final DTV table of allotments, the applicant should be permitted to modify the application for that channel to remove the conflict, if possible. For example, if an applicant has applied for a particular channel that can no longer operate at the applied for signal strength because it would cause interference to a DTV allotment, the applicant would be afforded the opportunity to modify the proposed signal strength to avoid such interference. If the modification is feasible, the Commission will be able to accommodate both the NTSC applicant and the transition to DTV.

Any final DTV plan will be the result of many years of hard work by the Commission and many parties in the television industry. The WB's desire for flexibility will not undermine that commendable effort. Rather, The WB asks only that in situations where a pending NTSC station application conflicts with the final DTV table of allotments, applicants be permitted to modify their applications to conform, if possible, to the newly imposed spectrum limitations. This proposal is clearly in the public interest because it both preserves the DTV plan and

fosters the viability and growth of new networks by creating additional affiliation opportunities.

B. The Commission Should Adopt Its Proposal To Permit Broadcasters To Negotiate Co-Location Agreements

The Commission proposes, in the Sixth Further Notice, to allow broadcasters within a community to negotiate among themselves to develop an alternative allotment/assignment plan for the local community utilizing the broadcasters' designated spectrum. Such negotiated allotments/assignments could include agreements to co-locate DTV transmitters at a single site. The Commission states that "[c]o-location could provide broadcasters increased flexibility to share spectrum and develop multichannel programming services and may also encourage the development of alternative DTV transmission technologies."²¹

The WB agrees with and supports the Commission's proposal to permit broadcasters to negotiate co-location agreements. As the table at paragraph 98 of the Sixth Further Notice illustrates, co-locating two stations within a short distance of each other eliminates the interference between channels that would otherwise be subject to a UHF taboo, so long as the required D/U ratio is maintained. This will allow additional channels to be allotted in a market, which, in turn, will increase affiliation opportunities for new networks. The WB therefore supports the Commission's proposal to permit co-location, so that the co-location opportunities identified by the Commission in the paragraph 98 table can be realized, as can any additional co-location opportunities that later studies determine to be viable.

²¹ Sixth Further Notice, 11 FCC Rcd at 10987.

C. The Commission Should Eliminate Unnecessary UHF Taboos

The UHF taboos were adopted by the Commission four decades ago to prevent interference between two stations. Since the adoption of the UHF taboos, however, the Commission itself has questioned the need for certain taboos. For example, in a report entitled "A Study of UHF Television Receiver Interference Immunities,"²² the Commission staff found in a study of 1983 model receivers that UHF performance with regard to local oscillator interference was generally comparable to or better than VHF interference. Because VHF stations are not subject to spacing requirements, the study called into question the required UHF spacing listed in 47 C.F.R. § 73.698 -- a taboo that was initially designed to prevent oscillator interference. Likewise, the +-5, -4, -14 and -15 taboos, have since been proven to be unnecessary to prevent interference. The Commission acknowledges as much in Appendix B-3 to the Sixth Further Notice.

These taboos act to limit the number of channels that may be allotted in a market. While they might be of little or no consequence in a world in which channel availability exceeded demand, we do not live in such a world. Indeed, the amount by which demand for channels exceeds supply will grow even larger during the conversion to DTV. Rather than maintain taboos that have been proven unnecessary to prevent interference, the public interest requires that the Commission instead eliminate those unnecessary taboos and thereby increase the number of channels that may be allotted as the television industry transitions to DTV.

²² OET Technical Memorandum, FCC/OET TM-3, August 1987.

**D. The Commission Should Assign DTV Channels To Currently Non-
“Eligible” Broadcasters On A Priority Basis If Spectrum Is Or
Becomes Available Or Allow Those Broadcasters To Convert
Their NTSC Channel To DTV**

As the Commission recognizes in the Sixth Further Notice, in some communities -- primarily rural communities -- unused channels could remain following the assignment of DTV channels to all eligible broadcasters.²³ In addition, the Commission anticipates that after the transition to DTV has been completed (and NTSC channels have been returned), a substantial amount of additional spectrum will remain in the core spectrum.²⁴ The Commission thus requests comment on whether and how those channels should be made available during and after the DTV transition “to bring additional service to the public both during and after the transition.”²⁵ The WB urges the Commission to make vacant channels available to licensees and permittees²⁶ without a DTV channel, both during and after the transition when even more channels will be available. This will allow non-“eligible” broadcasters to obtain a DTV channel. These vacant channels should be made available to non-“eligible” broadcasters on a priority basis.²⁷

²³ Sixth Further Notice, 11 FCC Rcd at 10988.

²⁴ *Id.*

²⁵ *Id.*

²⁶ By “permittees,” we mean to include both existing permittees and those with applications pending.

²⁷ As The WB urged above with respect to pending applications for NTSC channels, *see* p. 9, the Commission should refrain from applying the “maximum power and antenna height standard” in evaluating interference for these additional DTV channels. Rather, the Commission should allow non-“eligible” broadcasters to select power, antenna pattern and height within a range of a typical minimum to the allowable maximum in order to “fit in” a DTV channel where possible. The Commission also should allow “eligible” broadcasters to upgrade from their assigned DTV coverage by similarly limiting engineering criteria.

To the extent an additional channel does not become available or if a non-“eligible” broadcaster wishes to keep its existing channel, the Commission should allow a broadcaster to keep its existing channel, but convert it to DTV.

Whenever feasible, DTV allotments to non-“eligible” broadcasters should be made at the same time that DTV channels are assigned to “eligible” broadcasters in order to facilitate a smooth transition to DTV. If sufficient spectrum is not currently available to assign DTV channels to non-“eligible” broadcasters, the Commission should promptly assign those broadcasters DTV channels as the channels become available. (Non- “eligible” pending station applicants should receive like treatment once they have been granted a construction permit.)

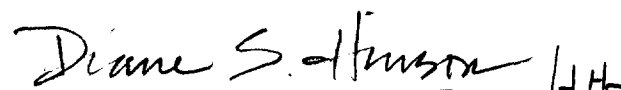
The assignment of DTV channels to currently non- “eligible” broadcasters as soon as additional spectrum becomes available, or allowing those broadcasters to convert their existing NTSC channels to DTV, will facilitate the smooth transition of *all* broadcasters from the NTSC age to the digital era. This, in turn, will serve the FCC’s public interest objective of fostering diversity by ensuring that the maximum number of stations are available for affiliation with new networks.

CONCLUSION

The Commission has the opportunity to foster two of its objectives -- it can craft rules applicable to DTV in a manner that uses the television spectrum more efficiently so that the Commission can recover some of the spectrum and, at the same time, the Commission can foster the growth and vitality of new television networks. To accomplish both goals, however, rather than sacrificing one to the other, the Commission should modify its proposed transition to DTV in the manner set forth in these comments. By adopting these proposals and moving

swiftly to consider and act on the pending station applications and petitions for rulemaking, the Commission can best serve the public interest.

Respectfully submitted,

A handwritten signature in cursive script, reading "Diane S. Hinson", followed by the initials "JHJ".

Diane S. Hinson
Susan H. Crandall
Joyce H. Jones
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006-1888
Telephone: (202) 887-1500

Counsel for The WB Television Network

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